

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OSUNG AND QUAN LEE	:	:DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Years 1980, 1981 and 1982.	:	

Petitioners, Osung and Quan Lee, 1426 12th Street, Fort Lee, New Jersey 07024, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1980, 1981 and 1982 (File No. 802277).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 30, 1989 at 9:15 A.M., with all briefs filed by September 13, 1989. Petitioners appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional personal income tax due from petitioners for the years 1980, 1981 and 1982 utilizing a source and application of funds audit methodology.

II. Whether the Division of Taxation was barred by the statute of limitations set forth in Tax Law § 683 from assessing tax against petitioners for the year 1980.

FINDINGS OF FACT

As a result of a field audit of petitioners' books and records, the Division of Taxation issued three statements of personal income tax audit changes to petitioners, Osung and Quan Lee, for the years 1980, 1981 and 1982.

For the year 1980, the Statement of Personal Income Tax Audit Changes stated the following as an explanation for the tax deficiency for said year:

	<u>Wife</u>	<u>Husband</u>
"As a result of audit, additional		
cash needed is being deemed		

Miscellaneous Income	\$75,316.00	-0-	
Medical Adjustment	107.00	\$1,911.00	
<u>NYS Only</u>			
Interest on U.S. Gov't. bonds modification	1,161.00	(1,161.00)	
Each person has to take his own exemption	750.00	(750.00)	
Net Adjustment	77,334.00	-0-	
Taxable Income Previously stated	4,085.00	-0-	
Corrected Taxable Income	81,419.00	-0-	
Tax on Corrected Taxable Income	9,958.66	-0-	
New York City Tax	3,101.02	-0-	
Corrected Tax Due	13,059.68	-0-	
Tax Previously Computed	162.43	-0-	
Total Additional Tax Due	12,897.25	-0-	
Penalty 685(b)	644.86	-0-	
Interest	5,976.33	-0-	
Total			\$19,518.44"

For the year 1981, the explanation on the Statement of Personal Income Tax Audit Changes set forth the following:

	<u>Wife</u>	<u>Husband</u>	
"As a result of audit, additional cash needed is being deemed			
Miscellaneous Income		\$93,936.00	-0-
Medical Adjustment	-0-	1,556.00	
<u>NYS Only</u>			
Interest actually belonging to wife		7,739.00	(7,739.00)
Interest on U.S. Government bonds modification		(81.00)	81.00
Net Adjustment		101,594.00	(6,102.00)
Taxable Income Previously Stated		5,835.00	6,746.00
Corrected Taxable Income		107,429.00	644.00
Tax on Corrected Taxable Income		13,600.00	13.00
Add: New York City Tax		4,219.00	6.00
Corrected Tax Due		17,819.00	19.00
Tax Previously Computed		292.00	320.00
Total Additional Tax Due		17,527.00	(301.00)
Penalty 685(b)		876.00	-0-
Interest		5,698.00	(98.00)
Total		\$24,101.00	(399.00)
Net Due for Both Spouses			\$23,702.00"

Finally, for the year 1982, a Statement of Personal Income Tax Audit Changes was issued to petitioners which set forth the following explanation:

	<u>Wife</u>	<u>Husband</u>
"As a result of audit, additional		

cash needed is being deemed

Miscellaneous Income	\$64,571.00	-0-
Medical Adjustment	3,347.00	-0-
Disallowed Capital Loss	3,000.00	-0-

NYS Only

Income and Exemptions must be taken
by Actual Person

Subchapter S Income	2,100.00	(2,100.00)	
Interest Income	3,129.00	(3,129.00)	
Interest on U.S. Government bonds modification	(7,489.00)	7,489.00	
Exemption	800.00	(800.00)	
Net Adjustment	69,458.00	1,460.00	
Taxable Income Previously Stated	7,195.00	1,523.00	
Corrected Taxable Income	76,653.00	2,983.00	
Tax on Corrected Taxable Income	9,291.00	79.00	
Add: New York City Tax	2,896.00	37.00	
NYC Surtax at .05	145.00	-0-	
Corrected Tax Due	12,332.00	116.00	
Tax Previously Computed	360.00	52.00	
Total Additional Tax Due	11,972.00	64.00	
Penalty 685(b)	599.00	-0-	
Interest	2,128.00	11.00	
Total	\$14,699.00	75.00	
Net Due for Both Spouses			\$14,774.00"

Petitioners timely filed New York State income tax resident returns for the years 1980, 1981 and 1982. Although petitioners marked the filing status "Married filing joint return" they in fact filed separately on one return for each of the years in issue.

The auditor sent a consent fixing the period of limitation on assessment to the petitioners or their representative on March 2, 1984. Petitioners, by their representative, Murray Appleman, Esq., and the State Tax Commission, executed a consent fixing the period of limitation upon assessment of personal income tax extending the date by which the Division of Taxation must have assessed additional tax liability to petitioners for the year 1980 to April 15, 1985. However, neither the signature of petitioners' representative nor that of the Deputy Commissioner signing on behalf of the State Tax Commission was dated. Further, the consent form bore no date stamp.

On March 25, 1985, the Division of Taxation issued to Osung and Quan Lee four notices of deficiency which set forth the following:

<u>Year</u>	<u>Additional Tax Due or Tax Deficiency</u>	<u>Total Penalty</u>	<u>Interest</u>	<u>Amount Due</u>
1980	\$12,897.25	\$644.86	\$6,389.22	\$19,931.33
1981	17,226.00	876.00	6,099.35	24,201.35
1982	64.00	-0-	12.64	76.64
1982	11,972.00	599.00	2,436.46	15,007.46

After requesting and receiving books and records from petitioners, the Division of

Taxation performed a "cash availability" audit, which traced petitioners' sources of income and subsequent applications of that income. The Division made a complete analysis of savings and checking accounts including all withdrawals, deposits and interest credited.

For each of the years in issue, sources of income such as net salary, social security, rental income, interest income, loan repayments, sale of stock, insurance proceeds and withdrawals from accounts were totalled and compared with the disposition or application of income including deposits to savings and checking accounts. For the year 1980, disposition or application of income exceeded sources of income by \$75,316.00; for 1981 applications of income exceeded the sources by \$93,936.00; and for 1982 application or disposition of income exceeded sources by \$64,571.00. The sum of these excesses of application over sources of income was categorized as miscellaneous income to petitioners and was treated as unreported income. When this figure was combined with medical adjustments, modifications of interest on United States Government bonds, personal exemptions, a disallowed capital loss, modifications to Subchapter S income, additional interest income, and redistribution of income between spouses, the result was a net adjustment reflected on the statements of personal income tax audit changes. The Division then combined these figures for each of the three years with the taxable income reported to arrive at a corrected taxable income. State and City taxes were computed from this amount and, for each of the years, subjected to penalty pursuant to Tax Law § 685(b) and interest to arrive at a total amount due.

Petitioners offered no evidence, either documentary or testimonial, to contradict or prove erroneous either the audit methodology or conclusions reached by the Division in the statements of personal income tax audit changes or the notices of deficiency.

SUMMARY OF PETITIONERS' POSITION

Petitioners alleged in their petition that the expiration of the statute of limitations barred any assertion of tax for the year 1980.¹ They also contend that all adjustments which were based on

unexplained deposits were erroneous because they were substantiated by transfers from other accounts.

Petitioners argue that the auditor could not relate a basis for various reductions in the cash availability analysis; that credit was not given for certain withdrawals which could not be traced; and that petitioners' books and records were available and therefore a "customary" audit method could have been used.

CONCLUSIONS OF LAW

A. The use of the "cash availability" analysis to determine if there were deficiencies in petitioners' personal income tax was proper under the circumstances present in this matter (see, Giuliano v. Chu, 135 AD2d 893). The burden of proof is upon petitioners to demonstrate by clear and convincing evidence that the method used to arrive at the assessments or the assessments themselves are erroneous (Matter of Scarpulla v. State Tax Commission, 120 AD2d 842). Petitioners, through their complete failure to present any proof as to the

¹It is noted that the Division never answered this contention specifically in its answer to the petition or at hearing.

incorrectness of the notices of deficiency, have surrendered to the presumption of correctness and the deficiencies must be sustained (Matter of Tavalacci v. State Tax Commission, 77 AD2d 759; Matter of Cousins Service Station, Inc., Tax Appeals Tribunal, August 11, 1988). Petitioners' argument that certain credits were not issued for withdrawals from accounts and their contention that the auditor was unable to articulately explain certain reductions in available funds are without merit. The auditor's workpapers adequately explain the audit methodology and petitioners have never produced any evidence to challenge the validity of the conclusions reached therein.

B. Tax Law § 683(a) provides:

"General.--Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)."

Since the return for tax year 1980 was timely filed, it is deemed to have been filed on the last day prescribed by law or regulation for the filing thereof, i.e., April 15, 1981. (Tax Law § 683[b]; 20 NYCRR 146.1, 146.2.)

However, Tax Law § 683(c)(2) provides an exception to this rule:

"Extension by agreement.--Where, before the expiration of the time prescribed in this section for the assessment of tax, both the tax commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Applying the law to the instant facts, it was incumbent upon the Division to procure a properly executed consent to extend the period of limitation upon assessment prior to the expiration of the time to assess additional tax, i.e., April 15, 1984. (Tax Law § 683[a].) It is determined that the Division did not procure a properly executed consent since it was not dated by either party and bore no date stamp. It was impossible to determine whether or not said consent was executed prior to the expiration date of the time prescribed in Tax Law § 683 for the assessment of tax. (See, Mantzel v. Commissioner, 41 TCM 1237; IRC § 650[c][4]; Treas Reg § 301.6501[c]-1[d].)

However, notwithstanding the invalid consent, the assessment was timely issued pursuant to Tax Law § 683(d)(1), which states in part:

"The tax may be assessed at any time within six years after the return was filed if--

(1) an individual omits from his New York adjusted gross income, ...an amount properly includible therein which is in excess of twenty-five per cent of the amount of New York adjusted gross income...stated in the return...."

In the instant matter, the New York adjusted gross income reported by petitioners on their 1980 New York income tax return was \$8,527.00 for the wife and \$5,000.00 for the husband. Twenty-five percent of the former is \$2,131.75 and 25 percent of the latter is \$1,250.00. In any event, the amount which has been determined to have been omitted from income was in excess of \$75,000.00 and, hence, greater than 25 percent of New York adjusted gross income of either the husband or wife. Therefore, the tax may be assessed within six years after the return was filed. (Tax Law § 683[d][1]; see Matter of James R. Sholly and Kathleen V. Sholly, Tax Appeals Tribunal, January 11, 1990.)

C. The petition of Osung and Quan Lee is denied and the notices of deficiency, dated March 25, 1985, are sustained together with such additional interest as may be lawfully due and owing.

DATED: Troy, New York
March 15, 1990

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE